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Our Supreme Court Holds

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PICTURES WANTED

Anyone having any information where to obtain the pictures of W. H. Standish, who served as Attorney General in 1893-94, and of C. N. Frick, who was Attorney General from 1903-1906, are asked to contact Alvin C. Strutz, State Attorney General, Bismarck, N. D. Mr. Strutz is attempting to locate pictures of all of the former State Attorneys General.

OUR SUPREME COURT HOLDS

In State of North Dakota, Respt. vs Thorwald Mostad. Applt.

That motion to set aside amended information for want of preliminary examination was properly denied where complaint and amended information charged the same crime and contained the same allegations of particular acts of the defendant.

That defendant is not entitled as a matter of right to a preliminary examination before trial of a criminal action in County Court. Section 8964 Compiled Laws of North Dakota 1913, Chapter 121 Laws of North Dakota 1925.

That error, if any, in permitting testimony of witness given at preliminary examination, to be read in evidence at trial was not prejudicial, where all of the material facts testified to by the witness were admitted by the defendant.

That additional instruction, given by trial court at jury's request, is examined and held not error.

That sufficiency of evidence to sustain the verdict may not be reviewed upon appeal from judgment where there was no motion for an advised verdict or, after verdict, for a new trial.

Appeal from the County Court of Ward County, Hon. Jos. J. Funke, Judge.

AFFIRMED.

Opinion of the Court by Burke, J.

In L. R. Baird, as Receiver for the Farmers & Merchants Bank of New England, North Dakota, a corporation, Respt. vs Sax Auto Company, a corporation. Applt.

That where an action is commenced to foreclose a mortgage on property described as Lots 10 and 11 of Block 1, etc., and the property is properly described in the pleadings, in the order for judgment, in the judgment, and in the special execution ordering the sale of the said premises, the fact that through some inadvertance the property is described in the notice of sale as Lots 11 and 12, and the report of sale describes the property as Lots 11 and 12, and the order of confirmation of the sale is made with reference to the same description, the defect does not constitute a jurisdictional one; though an irregularity on the part of the officer authorized to make the sale.

That where the district court confirms such sale as Lots 11 and 12 instead of Lots 10 and 11, the effect is to constitute a valid sale of Lot 11 in the absence of any motion or proceeding of any character to set aside the sale made before the year of redemption has expired.

That where the holder of the certificate of sale received a sheriff's deed to Lot 11 upon the expiration of the period of redemption, and commenced an action for the recovery of the value of the use and occupation of said Lot 11, the one in the continuous possession of Lot 11 must account for the value of said use and occupation of Lot 11 from the time of this expiration.

That in such an action, the measure of damages is not necessarily the sum which the occupant of the premises may have theretofore paid as rent, but is the value of the use and occupation of the premises owned by the plaintiff.

That where the record shows that Lot 11 is part of a parcel of land des-

cribed as Lots 10 and 11, that there is on said premises a building used as a garage, extending equally over the two lots, and that the defendants, prior to the obtaining of title by the plaintiff, had paid for the entire premises a rent of $60.00 per month for eleven months of the year, and after obtaining his title the plaintiff commenced an action for the value of the use and occupation of Lot 11, the plaintiff is not entitled to a recovery based upon an aliquot part of the rent heretofore paid, but only to the value of the use and occupation of that portion of the premises owned by the plaintiff.

Appeal from a judgment of the District Court of Hettinger County, Hon. H. L. Berry, Judge.

Judgment Modified, and as Modified, Affirmed, Opinion by Burr, J. Morris, J. dissents.

Rose Aberle, Applt. vs Dorothea Merkel, et al, Respt.

That upon the death of an intestate leaving real estate, such real estate passes immediatey to his heirs, subject to the control of the county court and to the possession of any administrator appointed by that court for the purposes of administration.

That upon the docketing of a judgment of the district court, it becomes a lien on all the real property of the judgment debtor, except his homestead, in the county where the judgment is docketed, and on all the real property which he shall acquire therein at any time thereafter, within the period of limitations.

That where, upon the administration of the estate of an intestate, it is found that an heir is indebted to the estate, the estate has a lien upon all of the interest of said heir in the estate to secure the payment of the debt, and such lien is superior to any lien which a judgment creditor of the said heir may have in the interest of the heir.

That where an heir has an interest in all of the real personal property belonging to the estate of an intestate, and at the same time is a debtor to the estate, and his judgment creditor has a lien upon the heir's interest in real estate to secure the payment of the judgment, it is the duty of the administrator, in the collection of the superior lien which the estate has upon the interest of the heir, to proceed first against whatever interest the heir has in the personal property so as to marshal the assets of the debtor and protect the interest of the inferior lien holder.

That where, in the settlement of the estate of an intestate, all of the heirs agree by and with each other to settle the affairs of the estate and to distribute the property among themselves, ignoring a judgment creditor of one of the heirs, such agreement does not affect the lien which the judgment creditor has against the interest of the judgment debtor in the real property of the estate.

That where, in the settlement of the estate of an intestate, the heirs agree by and among themselves and with the administrator, that the lien which the estate has on the property of one of the heirs for the payment of his debt to the estate shall become the property of the administrator and shall attach only to certain real estate granted to the debtor heir, and thereafter the administrator and the debtor heir agree that the heir shall transfer the property to the administrator in settlement of the debt and the lien securing the debt, and such transfer is made, equity will require the judgment creditor of the debtor heir to proceed against the remainder of the interest of the debtor heir before resorting to the real property transferred to the administrator.

Appeal from a judgment of the District Court of McIntosh County, and a trial de novo demand: Hon. W. H. Hutchinson, Judge.

REVERSED.

Opinion of the Court by Burr, J.

In State of North Dakota, doing business as The Bank of North Dakota, a state agency, Pltf. and Respt., vs. Charles L. Crum, Deft. and Applt.

That in an action in forcible entry and detainer, commenced in justice court, where the question of the title to real property becomes a material issue upon the pleadings so that the court discontinues the trial and transmits all the

pleadings and papers to the district court, the district court has jurisdiction over the action as if it had been commenced originally therein, and in such a case, all the issues involved in the question of title may be heard and determined in the action. The district court has power to permit such appropriate amendments to the pleadings as may be necessary to set forth all issues involved.

That a warranty deed, absolute upon its face, is presumed to be an unconditional conveyance. and the one who asserts the contrary has the burden of producing proof, clear, satisfactory. specific, and of such character as to leave no substantial doubt, before this presumption is overthrown. Dean V. Smith, 53 N. D. 123, 204 N. W. 987 followed.

That an option to purchase property is a mere privilege to buy, given by the owner of the property to another. The optionee is not a purchaser.

That where a lease of real property contains a provision granting to the lessee an option to purchase upon terms stated therein, such option in itself constitutes no contract of purchase until it is accepted within the terms of the provision.

(Syllabus by the Court)

Appeal from the District Court of Burleigh County, North Dakota; Hon. Harvey J. Miller, presiding Judge.

AFFIRMED,

Opinion of the Court by Burr. J.

In Tobias Lee as administrator of the estate of Margaret Lee, deceased, Betsey T. Lee, Albert Lee, Thomas Lee, Mabel Nelson ,Tillie Knutson, and Tobias Lee, individually, Pltffs. and Applts. vs. George Lee, Josephine Lee, Julia Lee and Myrtle Otterson, Defts. and Respdts.

That where a deed purports to grant and convey real estate the law presumes it was the intent of the grantor to pass a fee simple title, unless it appears from the grant that a lesser estate was intended. Section 5527, Comp. Laws 1913, construed.

That in determining incapacity of a grantor, such as to render his deed invalid, the court must be satisfied that the grantor was not in a situation to transact that particular business rationally. On the one hand, it is not necessary to show that he was capable of doing all kinds of business with judgment and discretion; nor, on the other hand, to show that he was wholly deprived of reason so as to be incapable of doing the most familiar and trifling work. His deed would be void if his mind and memory were in such a situation at the time of executing the deed as to render him wholly incompetent to judge of his rights and interests in relation to that transaction.

That the capacity to execute a deed is the capacity at the time the deed was made.

That before a conveyance of real property will be set aside as having been given under duress and fraud, the proof must be clear, specific, and satisfactory. Anderson v. Anderson et al., 17 N. D. 275, 115 N. W. 836, followed.

That the mere fact that a parent deeds property to a child does not of itself raise a presumption of undue influence; nor is there any presumption of undue influence or fraud merely from the fact that some children are favored to the exclusion of others.

(Syllabus by the Court).

Appeal from the judgment of the District Court of Cass County, Hon. M. J. Englert, Judge.

AFFIRMED.

Opinion of the Court by Burr, J.

In Amelia Alswager, Pltf. and Applt., v. Ralph Dwelle, Deft. and Respt., and The City of Jamestown, a municipal corporation, Garnishee Respt.

That Section 7568 of the Compiled Laws provides for but two classes of cases in which garnishment proceedings may be employed. The first pro-

vides for the use of such proceedings before judgment in an action founded upon a judgment, or in an action founded upon a decree. The second provides for the employment of garnishment proceedings after the entry of judgment.

That after judgment is entered in an action garnishment proceedings may not be commenced to collect said judgment until after an execution has been issued.

Appeal from a judgment of the District Court of Stutsman County, quashing garnishment proceedings. Hon. R. G. McFarland, Judge.

AFFIRMED. Opinion of the Court by Burr, J.

In Ethel M. Bekken, Administratrix of the Estate of Oscar H. Bekken, deceased, Pltf. and Respt., vs. The Equitable Life Insurance Society of the United States, a foreign corporation, Deft. and Applt.

That a life insurance company which solicits an application for a life insurance policy and induces the person so solicited to make payment of premium on the policy applied for, on the representation or agreement on the part of the company that the insurance shall take effect as of the date of the receipt given for such premium, if a satisfactory report of medical examination is furnished, and if applicant is on the date of the receipt, in the opinion of the comapny's officers, an insurable risk under its rules and the applicatiton is otherwise acceptable on the plan and for the amount and at the rate applied for ,is placed under a legal duty to act promptly upon such application, and the failure of the company to perform such duty renders it liable in damages.

That where the application for life insurance so solicited provides that the policy shall be made payable to a certain named beneficiary and the company is informed, or it is apparent to it from facts and circumstances brought to its knowledge, that the primary purpose sought to be accomplished by the insurance applied for is to insure payment to such proposed beneficiary of the amount of insurance applied for, in event of applicant's death, the duty of the insurance company concerning such application extends to such proposed beneficiary as well as to the applicant, and in event applicant dies before the company acts upon the application, and the company has breached its duty to act promptly upon the application, such beneficiary has a right of action against the insurance company for the breach of its duty to her.

That the questiton whether there has been negligent delay on the part of an insurer in acting upon an application, like other questions of negligence, is generally one of fact for the jury. It becomes a question of law only where the facts and circumstances are such that reasonable men, in the exercise of reason and judgment, can reach only one conclusion.

That the evidence is examined and for reasons stated in the opinion held sufficient to sustain a verdict in favor of the plaintiff.

That where the beneficiary named in the application for life insurance has a right of action against the insurance company for its breach of duty in failing to act promptly opon the application, and she sues in her representative capacity as the administratrix of the estate of the deceased applicant, a judgment obtained in such action will be sustained against an objection that she is not the proper party plaintiff, as in such case the judgment is a bar to any further action either by the beneficiary individually or in behalf of the estate and the defendant cannot possibly be prejudiced by the procedure that was followed.

Appeal from the District Court of Stutsman County, Hon. Fred Janeonius, J. Defendant appeals from judmgent and from order denying motion for judgment notwithstindg verdict or for a new trial.

AFFIRMED. Opinion by Christianson, J.